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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 145

CARLOS MARCELLO,

Petitioner

vs.

JOHN M. BONDS, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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SUPREME COURT OF THE UNITED STATES

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JOHN M. BONDS, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals (R. 32-44) is reported at 212 F. 2d 830. The opinion of the District Court (R. 19-24) is reported at 113 F. Supp. 22.

Jurisdiction

The judgment of the Court of Appeals was rendered on May 6, 1954 (R. 45). The petition for a writ of certiorari, filed on June 17, 1954, was granted on October 14, 1954. The jurisdiction of this Court was invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether the issuance, prior to any deportation hearing, of an announcement by the Attorney General stating that petitioner was within his program to rid the country of undesirable persons, as reflected in the undenied allegations of the petition for habeas corpus and the evidence, established prejudgment and prevented a fair hearing.

2. Whether deportation hearings conducted under the McCarran-Walter Act (8 U. S. C. 1252-b) are required to conform to the separation of functions provisions (5 U. S. C. 1004) of the Administrative Procedure Act.

3. Whether, apart from the Administrative Procedure Act, deportation hearings which permit hearing officers to be subject to the control of superiors who investigate and prosecute, fail to conform to generally accepted standards of fairness and impartiality required by due process.

4. Whether deportation fifteen years later for a crime committed in 1938 which was not a deportable offense until 1952, violates the *ex post facto* provisions of the Constitution.

Constitutional Provisions, Statutes and Regulations Involved

The applicable statutes are set forth in the appendix herein beginning at page 57.

Statement

Petitioner, a 43 year old native of Tunis, Africa, came to the United States lawfully for permanent residence on October 7, 1910, when he was eight months old. Except for a one hour visit to Mexico, he has been here ever since. He is married to an American citizen and has four American-born children. His father, formerly a citizen of Italy, became a citizen of the United States in 1942 and is now deceased. His mother is still a resident of the United States (R. 4, 68, 78, 80; Immigration Transcript, Ex. H pp. 2-3).

On October 29, 1938, petitioner was convicted of violation of the Marihuana Tax Act of 1937 (26 U. S. C. 2591) and sentenced to imprisonment for one year (R. 54). At that time and until December 24, 1952, such conduct did not render an alien deportable (R. 56).

Attorney General McGranery ordered the arrest of petitioner in deportation proceedings on December 30, 1952. On that day, he issued a press release stating that petitioner's arrest was a step in his program to deport undesirables, that petitioner was engaged in large scale slot machine operations, and that his marijuana conviction in 1938 was a deportable offense under the new Immigration and Nationality Act (Appendix B herein, p. 64 *infra*). The Attorney General's announcement was reflected in front page headlines of all the New Orleans' newspapers for December 30 and 31, 1952 (Immigration File, Exhibit 7; see also R. 67). Several of these newspapers (The New Orleans Item and The New Orleans States devoted almost their entire front page to the deportation arrest of petitioner. (Immigration File, Exhibit 7, Respondent's 1 and 2). The New Orleans States for December 31, 1952, editorialized that however controversial the McCarran-Walter Act, it was to be praised for that part which offered hope for getting rid of Carlos Marcello. (Immigration File, Exhibit 7, Respondent's 4).

The petition for a writ of habeas corpus herein alleges without contradiction by any subsequent pleading that the Attorney General's announcement described petitioner as an undesirable, and that petitioner was on a proscribed list of alien deportees prepared by the Attorney General in 1952 (R. 7, 8; par. XI, XII).

A deportation hearing was held on February 16, 1953. Objections to the hearing upon the ground that it violated the Administrative Procedure Act and due process were overruled. Deportation was directed on February 20, 1953.

A request to reopen, to consider discretionary relief in the form of suspension of deportation pursuant to 8 U. S. C. 1254, (which would waive the grounds of deportation and reinstate petitioner's permanent residence) was denied (R. 67-81).

The Board of Immigration Appeals affirmed (R. 54-67). The Board assumed that petitioner might be eligible for suspension of deportation but upon the basis of a criminal offense for which he was pardoned; his refusal to testify before the Kefauver Committee upon the ground of self incrimination, and the newspaper stories herein (Exhibit 7), introduced to show prejudgment (Immigration Transcript p. 10), determined to deny discretionary relief to petitioner (R. 66, 43).

Pleadings and Judicial Proceedings Below

The petition for habeas corpus filed herein subsequent to the decision of the Board of Immigration Appeals alleges:

1. That petitioner was denied a fair hearing by reason of the Attorney General's announcement, prior to the deportation hearing, that petitioner was undesirable and the Attorney General's inclusion of petitioner on a proscribed list of deportees (R. 7-8, par. XI, XII).

2. That petitioner's deportation hearing was unfair by reason of its failure to conform to due process, the separation of functions requirement of the Administrative Procedure Act, and currently prevailing standards of fairness (R. 5-7, par. VII-XI).

3. That petitioner's deportation under a retroactive 1952 law for non-deportable criminal conduct in 1938 violated Article 1, Section 9, Clause 3 of the Constitution (R. 9-11, par. XV-XVIII).

The return to the writ of habeas corpus failed to deny

the allegation relative to prejudgment or the Attorney General's announcement. It alleged in conclusory form, however, that the deportation hearing was conducted in conformity with the Constitution and applicable laws and regulations. Petitioner's immigration file was attached to the return (R. 14-16). It constituted the sole item of evidence at the habeas corpus hearing (R. 18).

The District Court, after noting that the deportation procedure followed herein under 8 U. S. C. 1252b, varied "in some particulars from the procedure under the Administrative Procedure Act," concluded that petitioner had a fair hearing "meeting currently prevailing standards of impartiality." (R. 22) and discharged the writ (R. 24-25).

The Circuit Court of Appeals affirmed and ruled as follows:

1. The deportation procedure followed herein under Section 242(b) (8 U. S. C. 1252b) "does not accord with Section 5(c) of the Administrative Procedure Act" (R. 36). Section 7(a) of the Administrative Procedure Act (5 U. S. C. 1006a) grants an exemption from Section 5(c). It was further held "that to the extent the proceedings prescribed by Section 242(b) are inconsistent with the Administrative Procedure Act, the requirements of the latter Act are inapplicable to the deportation proceedings". (R. 38).

2. The Administrative Procedure Act is not the sole criterion for fair hearings, and the petitioner's deportation hearing conformed to procedural due process (R. 39-41).

3. Petitioner did not prove the allegations of prejudgment by reason of the Attorney General's announcement or a proscribed list. In any event, petitioner was deportable as a matter of law (R. 41-42).

4. "It was not improper for the Board (of Immigration Appeals) to consider appellant's prior convictions, his

numerous arrests, and his refusal to give testimony before a Senate Investigating Committee in the exercise of its discretion to deny his application (for suspension of deportation). Although only three of his arrests resulted in convictions, and upon a holding that he was not criminally liable for refusing to testify before the Senate Committee, one of these was reversed, and he received a full pardon from another, the Board was not precluded from considering these factors in reaching its conclusion" (R. 44).

5. No violation of Article 1, Section 9, Clause 3, of the Constitution is presented (R. 42).

Summary of Argument

The Government itself, through the Attorney General (the hearing officer's superior), was a militant conscious participant in a deportation hearing by newspapers. The evidence and the undenied allegations of the habeas corpus petition established prejudgment and unfairness created by the Attorney General's proscribed list and his press release. *U. S. ex rel Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954); *Delaney* v. *United States*, 199 F. 2d 107 (C. A. 1, 1952). Moreover, erroneous considerations, including this adverse newspaper publicity, a conviction which was pardoned, a conviction which was reversed, and reliance upon a plea of self-incrimination, motivated denial of discretion herein.

Failure of the Immigration Service to isolate the hearing officer from superiors who investigate and prosecute in conformity with 5 U. S. C. 1004(c) rendered the hearing null and void. It did not conform to currently prevailing standards of fairness as required by due process. *Sung* v. *McGrath*, 339 U. S. 33 (1950). The 1952 Immigration and Nationality Act (8 U. S. C. 1252b) did not exempt the de-

portation process from the requirements of separation of functions [5 U. S. C. 1004(c)] in view of the provisions of 5 U. S. C. 1011 requiring an express exemption in subsequent legislation and the absence of any inconsistent provision authorizing superiors who investigate and prosecute.

The deportation of petitioner for criminal conduct in 1938 for which petitioner paid his debt to society can not be made the basis for deportation in 1952 without violating the constitutional prohibition against *ex post facto* laws. We respectfully seek reconsideration of this issue, mindful that the "slate is not clean," *Galvan* v. *Press*, 347 U. S. 522, 531 (1954) in the spirit of Mr. Justice Brandeis and Mr. Justice Holmes who declared that "no lapse of time or respectable array of opinion shall make the Court hesitate to correct an unconstitutional assumption of power by the courts of the United States." *Erie Railroad* v. *Tompkins*, 304 U. S. 64 at 79 (1937).

I

Procedural Due Process Was Denied Petitioner by Reason of Prejudgment and Governmental Trial by Newspapers

The habeas corpus petition alleges without contradiction that on the day petitioner was arrested in deportation proceedings, the Attorney General announced that "he was an undesirable citizen and had been guilty of many crimes and that the proceedings were specially designed to deport petitioner," that such publicity was bound to have great effect upon the deportation hearing officer (R. 7, par. XI), and that petitioner was upon a list of deportees prepared by the Attorney General in 1952 (R. 8, par. XII). Newspaper clippings introduced in evidence at the deportation hearing repeated that petitioner's arrest was pursuant to a program of the Attorney General "for ridding the country of 'undesirable persons of foreign birth who are engaged in racket-

eering or other criminal activities' " (R. 67). The official press release of the Department of Justice (Appendix B, herein, p. 64), in addition, states that petitioner is engaged in gambling activities in Louisiana, that his 1938 marijuana conviction is "a deportable offense under the new Immigration and Nationality Act," and that the deportation arrest "follows lengthy investigation by both the Federal Bureau of Investigation and the Immigration and Naturalization Service." The Attorney General's announcement produced two-inch bold face front page headlines in the New Orleans Item and the New Orleans States for December 30, 1952. Both newspapers devoted almost their entire front pages to petitioner's case, repeating that the arrest was pursuant to the Attorney General's deportation program and that Marcello's 1938 offense rendered him deportable (Immigration File, Exhibit 7, Respondent's 1 and 2). News stories on December 31, 1952, and January 6, 1953, (prior to the deportation hearing of February 16, 1953) set forth predictions of immigration officials that Marcello would be deported and offered praise editorially for legislation which offered hope "for getting rid" of Carlos Marcello (Immigration File, Exhibit 7, Respondent's 4-6). It was against this background that petitioner was accorded a deportation hearing on February 16, 1953.

The Court of Appeals held that petitioner did not prove the allegations of his petition for habeas corpus (R. 41-42). We submit that such ruling may not be sustained. The allegations of the petition were not denied by the conclusory allegations of the traverse that "the deportation hearing was conducted in accordance with the constitution" (R. 15, par. 4). *Peoples Natural Gas Co. v. Federal Power Commission*, 127 F. 2d 153, 156 (C. A. D. C., 1942). Under Rule 8(d) of the Rules of Federal Practice, "averments in a pleading to which a responsive pleading is required • • •

are admitted when not denied in the responsive pleading." *Mangaoang* v. *Boyd*, 186 F. 2d 191 (C. A. 9, 1950); *McComb* v. *Blue Star Auto Stores Inc.*, 164 F. 2d 329 (C. A. 7, 1947), *cert. denied*, 332 U. S. 855; *Moore* v. *Linahan et al.*, 117 F. 2d 140 (C. A. 2, 1941) *cert. denied*, 314 U. S. 628; *Fontes* v. *Porter*, 156 F. 2d 956 (C. A. 9, 1946); *Zydney* v. *New York Central Men's Credit Ass'n*, 113 F. 2d 986 (C. A. 2, 1940); *Whitten* v. *Tomlinson*, 160 U. S. 231, 242 (1895).

In view of the actual facts, the undenied allegations of the petition herein, and Exhibit 7, this record establishes that the Attorney General included petitioner on a list or within a program of deportees in 1952 (R. 8, par. XII).

In *U. S. ex rel Accardi* v. *Shaughnessy*, 347 U. S. 260, 267 (1954), this Court observed with reference to the Attorney General's 1952 deportation list:

> "public announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation, to the contrary, those listed were persons whom the Attorney General 'planned to deport.'"

Here, the Attorney General went further. He publically announced, prior to any deportation hearing, that Marcello was an undesirable who committed a deportable offense and who was within his deportation program. The Department of Justice, thus, not only prejudged Marcello's case, *U. S. ex rel Accardi* v. *Shaughnessy, supra*, but also became a conscious militant participant in trial by newspapers which had Marcello deported (Exhibit 7, Respondent's 5 and 6) prior to his hearing. Could Marcello secure a fair deportation hearing under these circumstances; or was he not entitled to fairness because he was deportable as a matter of law as noted by the Court of Appeals. (R. 42)?

Justice Brandeis observed that: "In the development of our liberty insistence upon procedural regularity has been

a large factor," *Bardeau v. McDowell*, 256 U. S. 465, 477 (1921).

The hearing contemplated by the immigration law and regulations (8 U. S. C. 1252b; 8 C. F. R. 242.53b) is a fair and impartial one. In administrative hearings, the liberty of individuals should be "protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing' . . . Such a hearing has been described as an 'inexorable safeguard.'" *Morgan* v. *United States*, 304 U. S. 1, 14, 15 (1937). And in this connection, it should be observed, that the "fact that a judgment may be justified on the merits does not obviate the requirement of a fair hearing." *National Labor Relations Board* v. *Bryan Mfg. Co.*, 196 F. 2d 477, 478 (C. A. 7, 1952); *Montgomery Ward & Co.* v. *National Labor Relations Board*, 103 F. 2d 147, 149 (C. A. 8, 1939); *Sung* v. *McGrath*, 339 U. S. 33 (1950).

> ". . . for a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judgment is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed." *National Labor Relations Board* v. *Phelps*, 136 F. 2d 562, 563 (C. A. 5, 1943). See also *In re K-3 Pike and Fischer*, Administrative Law (2d) 668 (1953).

Had the Attorney General acted in this fashion—had he issued press releases about a program and included a pend-

ing jury case within the program—there can be no doubt that it would be held that there was interference with the functions of the jury. *Delaney* v. *United States*, 199 F. 2d 107 (C. A. 1, 1952). As in the *Delaney* case, an atmosphere was created here, by the Department of Justice itself, which prevented fair, open, and impartial consideration. This Court recently noted: "A juror must feel free to exercise his functions without the F. B. I. or anyone else looking over his shoulder" *Remmer* v. *United States*, 347 U. S. 227, 229 (1954).

The hearing officer and the Board of Immigration Appeals, required by regulations having the force of law (8 C. F. R. 242.53b) and due process [*The Japanese Immigrant Case* 189 U. S. 86 (1903) *Sung* v. *McGrath*, *supra*] to act impartially and exercise their independent judgment, should have felt free to exercise their functions without the Attorney General's press release staring over their shoulders. The fact that the Attorney General was their superior, only made the force of the conduct herein more persuasive upon the ultimate decision. The proscribed listing of Marcello for deportation in advance of hearing, his inclusion within a program to deport as reflected in the press release (Appendix B, herein) as well as newspaper accounts, and the published predictions of immigration officials that Marcello would be deported (Immigration File, Respondent's 6)—all necessarily had a prejudicial effect upon the hearing officer and the Board, even as they would have had upon a jury.

> "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons deemed presumptively prejudicial if not made in pursuance of known rules of the court and the instructions and directions of the

court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Remmer* v. *United States*, *supra*.

The public announcement of the Attorney General in the instant case created an atmosphere of prejudice and interfered with the due process hearing to which petitioner was entitled.

The fallacy of the Court of Appeal's ruling that Marcello was not entitled to a fair hearing because he was deportable as a matter of law also overlooks the fact that discretion could have been exercised here to suspend deportation. What is most shocking, in this connection, is the fact that the Board of Immigration Appeals utilized, *inter alia*, the unfavorable newspaper accounts inspired by the Department of Justice as one of the grounds for denying suspension of deportation (R. 66). Here is a bold and forthright admission of the improper effect of trial by newspaper instigated by one who sat in prejudgment in this case.[1]

II

The Deportation Hearing Was Void for Failure to Comply With the Separation of Functions Requirement of the Administrative Procedure Act.

Petitioner has been accorded a deportation hearing under the 1952 Immigration and Nationality Act (8 U. S. C. 1252b)

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[1] The Court of Appeals also sanctioned the use of a pardoned crime, a plea of self incrimination, and mere arrests as proper bases for denying discretion (R. 42). We submit that these were improper grounds for denying discretion. A pardon blots out the crime. *Ex parte Garland*, 4 Wall. 333 (1867). The plea of self incrimination may not properly be utilized for inference of guilt. *U. S. ex rel Beltrago* v. *Shaughnessy*, 212 F. 2d 128 (C.A. 2, 1954); *Burdick* v. *United States*, 236 U. S. 79-95 (1914); *Johnson* v. *United States*, 318 U. S. 189, 196 (1943); *Maffie* v. *United States*, 209 F. 2d 225, 227-29 (C.A. 1, 1954); *U.S. ex rel.*

before a special inquiry officer to determine whether his fate will be exile and banishment from the only land he knows, a land where his parents reside as well as his wife and four children.

The habeas corpus petition alleges, without dispute, that this special inquiry officer was subject to those who engaged in investigatory and prosecutive functions (R. 6, par. X). Indeed the Court of Appeals acknowledged that the deportation procedure followed herein "does not accord with section 5(c) of the Administrative Procedure Act" (R. 36).

Section 5 of the Administrative Procedure Act (5 U. S. C. 1004) requires that in every case of adjudication required by statute, hearing officers shall not be responsible to officials engaged in investigatory functions and precludes such hearing officers from participating in investigatory or prosecuting functions in the same or a factually related case.

The Administrative Procedure Act requires that: "The separation of functions here required must be reflected in the rules of organization and procedure published pursuant to section 3(a)" of the Administrative Procedure Act. (*Senate Document 248*, 79th Congress, p. 262).

There is no dispute that the Immigration Service failed to comply with this mandate of the Administrative Procedure Act. Hearing officers are not only permitted to engage in investigations in factually related cases but are also subject to superiors who investigate and prosecute immigration cases—a situation which not only creates a psychological hazard to fairness but also a real danger that "the hearing officer inevitably will tend to tailor his determinations to the wishes of his superior officers . . ." *Report*

Heikkinen v. *Gordon*, 190 F. 2d 16, 19, 20 (C.A. 8, 1951), dismissed as moot 344 U.S. 870; *Zydok* v. *Butterfield*, 183 F. 2d 802, 803 (C.A. 6, 1951), vacated on other grounds, 342 U.S. 524. Nor may arrests without convictions be a ground for adverse reflections against petitioner. *U. S. ex rel. Castro-Lousan* v. *Zimmerman*, 94 F. Supp. 22 (E.D. Pa., 1950).

of the President's Commission on Immigration and Naturalization, Whom We Shall Welcome, 162 (1953).

If it be found that the deportation procedure was subject to the Administrative Procedure Act, then the deportation order entered in this case is null and void. Section 9 of the Act (5 U. S. C. 1008) prohibits the imposition of sanctions not authorized by law. It therefore remains to be seen whether the deportation hearing accorded petitioner was exempt from Section 5(c) of the Administrative Procedure Act by reason of the provisions of Section 242(b) [8 U. S. C. 1252b] of the 1952 Immigration and Nationality Act.

(A) *Section 12 of the Administrative Procedure Act.*

In its appraisal of the problem here presented, the Court of Appeals overlooked Section 12 of the Administrative Procedure Act (5 U. S. C. 1011). This section provides:

> "No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly."

Does the 1952 Immigration and Nationality Act expressly provide for commingling of functions, an evil which this Court described as particularly objectionable in deportation cases. *Sung* v. *McGrath*, 339 U. S. at p. 46?

(B) *History of Section 242(b) of the 1952 Immigration and Nationality Act*

1. H. R. 6652 and The Hobbs Bills

After this Court's decision in *Sung* v. *McGrath*, *supra*, the Immigration Service instituted efforts to secure full exemption from the provisions of the Administrative Procedure Act. *H. R. 6652*, 80th Congress 2d Session sought to relieve the Service by an amendment to the Administrative Procedure Act as follows:

"Except as to the requirements of section 3 [public information section] there shall be excluded from the operation of this Act . . . functions and proceedings authorized or required pursuant to the immigration and nationality laws. . . ."

The Committee report on this bill, which came through the House Immigration Committee (*House Report 2140*, 80th Congress, 2d Session, p. 1) noted:

"It is necessary to provide expressly for an exemption from the Administrative Procedure Act because of the provision found in section 12 of that act which reads:

'No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly'."

This bill, which inspired a vigorous minority report that its passage would start a queue of agencies seeking exemption (*House Report 2140, supra* p. 9) was not enacted. Efforts, however, continued with the introduction of the so-called Hobbs Bill in the 81st Congress, 1st Session (*H. R. 10*) which sought to grant specific exemption from sections 5, 7, 8, and 10 of the Administrative Procedure Act. Several organizations, including the American Bar Association opposed this exemption (*House Report 1792*, 81st Congress, 1st Session p. 20; House Immigration Hearings on H. R. 10, 81st Congress, Part 2, p. 1). Although the bill was reported favorably and approved by the House, it failed of enactment after the Senate had eliminated the exemption provisions. (*Senate Report 2239*, 81st Congress, 2d Session).

2. The Appropriations Rider. On September 27, 1950, efforts succeeded to exempt the Immigration Service from the Administrative Procedure Act. Tacked on to the Supplemental Appropriations Bill of 1951, without full leg-

islative comment [2] was the following [64 Stat. 1044; 8 U. S. C. 155(a)]:

> "Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7 and 8 of the Administrative Procedure Act (5 U. S. C. 1004, 1006, 1007).

This provision is inapplicable in the instant case, having been repealed by section 403(a)(47) of the 1952 Immigration and Nationality Act, effective December 24, 1952 (66 Stat. 280).

3. The Original Bills. On April 20, 1950, Senator McCarran introduced the first omnibus bill to revise the immigration laws (*S. 3455*, 81st Congress, 2d Session). Express reference was made to the Act of June 11, 1946—the Administrative Procedure Act. Section 242(b) of this original bill provided as follows:

> "Before the Commissioner shall issue a warrant for the deportation of any alien, a finding of deportability shall be made in the case of such alien by a special inquiry officer after proceedings at which the alien shall be present and which shall be appropriate to the case and just to the party affected, under such regulations as the Commissioner shall prescribe. *Notwithstanding any other law, including the Act of June 11, 1946 (60 Stat. 237), the proceedings so prescribed shall be the*

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[2] For the background of this rider, see Senate Hearings, Committee on Appropriations on the Supplemental Appropriations for 1951, 81st Congress, 2d Session, p. 751-755, and Joint Hearings before Sub Committees of the Committees on the Judiciary on S. 716, H. R. 2379 and H. R. 2816, 82nd Congress, 1st Session, p. 536.

In the curtailed debates the following exchange occurred (96 Cong. 13505):

"Mr. Judd: Is it not true that there probably have been more cases of injustice and arbitrary action in this sort of one man kangaroo court in the Immigration Service than almost anywhere else in the United States Government?

"Mr. Walter: That is true * * *".

sole and exclusive procedure for determining the deportability of an alien who is in the United States. Before any such proceedings shall be held, the aliens shall be served with a written notice thereof in sufficient time, and shall be informed therein of the nature of the charges against him in sufficient detail, so that he will be enabled to prepare his defense. At the proceedings the alien may, if he so elects, have the advice and assistance of counsel, cross-examine any witnesses supporting the charges against him, and present evidence on his own behalf. Any finding of deportability made as a result of such proceedings shall be based solely upon the evidence adduced therein, and no such finding shall be made unless there is probative evidence to support it." (Italics supplied).

S. 716 introduced by Senator McCarran on January 29, 1951 (82d Congress, 1st Session) and *H. R. 2379*, introduced by Congressman Walter during the same session again referred specifically to the Administration Procedure Act. These bills provided as follows:

"(b) A final order of deportation in any case shall be made by the Attorney General only upon a record made in a proceeding before a special inquiry officer, at which the alien shall be present. Such proceedings before a special inquiry officer shall be in accordance with such regulations as the Attorney General shall prescribe. No immigration officer shall act as the special inquiry officer under this section in any case in which such officer has engaged in investigative or prosecuting functions. Such regulations shall include as minimum requirements that—

(1) the alien shall have notice of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented by counsel of his choice at no expense to the Government;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision shall be valid unless it is based upon probative evidence.

Provisions shall also be made which, in the opinion of the Attorney General, are necessary and proper to safeguard the rights and privileges of mentally incompetent aliens against whom such proceedings are instituted, in whose cases the application of the preceding provisions of this subsection are impractical.

Notwithstanding any other law, including the Act of June 11, 1946 (60 Stat. 237), the proceedings so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien who is in the United States." (Italics supplied)

Hearings were held on the above bills and several organizations, including the American Bar Association opposed any proposed exemption under the Administrative Procedure Act. *Joint Hearings Before the Sub-Committees of the Committee on the Judiciary on S. 716, H. R. 2379, and H. R. 2816* pp. 591, 691-2, 739.

Thereafter *S. 2055* (August 27, 1951) and *H. R. 5678* (October 9, 1951) were introduced in the 82nd Congress. In these versions of the bill, *S. 2550*, introduced on January 29, 1952, and the bill as enacted, the language "*Notwithstanding any other law, including the Act of June 11, 1946 (60 Stat. 237)*" was deleted (Appendix A, p. 58).

1. House Debates. After the deletion noted above, Congressman Walter and Senator McCarran—the co-sponsors of the Administrative Procedure Act and the 1952 Immigra-

tion Act assured both houses of Congress that the Administrative Procedure Act would apply to deportation procedures.

On April 23, 1952, Congressman Walter said (98 Cong. Rec. 4302):

> "What do we do in this act? Instead of destroying the Administrative Procedures Act, we undo what Congress did in a deficiency appropriation b several years ago when it legislated to overturn a decision of the Supreme Court which ruled that the Administrative Procedures Act is applicable to deportation proceedings. We undo that. So here, instead of our destroying the Administrative Procedures Act, we actually see that it is reinstated in every instance."

The next day, he continued (98 Cong. Rec. 4416) as follows:

> "I would like to remind the gentleman of one thing, that Senator McCarran who sat in these hearings, and in the preparation of this bill, and I, were both commended by the American Bar Association because of the work we did in providing for judicial review from a decision of an administrative agency. We have been very zealous to see that the philosophy underlying that act is embodied in this measure. I am sure that if the gentleman will look at page 163, paragraph 46, he will find that the law as it was before the House adopted this amendment to an appropriation bill, has been reinstated and that the decision of the Supreme Court in the Sung case will be the law of the land when this code is adopted." [The reference to paragraph 46 of page 163 apparently should be to the same paragraph of page 161 of H.R. 5678, *supra*, which repealed the appropriations rider of September 27, 1951, *supra*.]

Senate Debates. On the floor of the Senate, Senator McCarran repeatedly stressed the fact that the Administrative Procedure Act was to be preserved. On May 16, 1952, Senator McCarran observed:

"* * * a perusal of the bill would convince any fairminded man that the bill is 100 percent within the framework of the Administrative Procedure Act, which, incidentally I sponsored and authored in the Senate." (98 Cong. Rec. 5329).

On May 21, 1952, Senator McCarran stated:

"Under the provisions of section 242 of Senate bill 2550, this exemption (Supplemental Appropriations Act of 1951) is terminated. * * *

Except for the failure to comply strictly with the dual examiner provisions of the Administrative Procedure Act, I believe that the procedures set forth are in substantial compliance with the procedural rationale of the Administrative Procedure Act.

* * * * *

Let me stress this point, Mr. President: My consistent effort has always been to avoid or eliminate any and all blanket exemptions from the Administrative Procedure Act." (98 Cong. Rec. 5626)

The following day he assured the Senate:

"The Administrative Procedure Act is made applicable to the bill. The Administrative Procedure Act prevails now.

* * * * *

The bill provides for administrative procedures and makes the Administrative Procedure Act applicable insofar as the administration of the bill is concerned." (98 Cong. Rec. 5778).

(C) *Section 242(b) does not expressly modify Section 5(c) of the Administrative Procedure Act.*

Section 5(c) of the Administrative Procedure Act (Appendix A, *infra*, p. 62) sets forth the following requirements:

1. Except with regard to *ex parte* matters, the hearing officer may not consult anyone on a fact in issue without opportunity for all parties to participate.

2. The hearing officer may not be responsible to or subject to the supervision or direction of any employee engaged in investigative functions for the agency. [There is no dispute that the special inquiry officer herein was subject to the supervision of an Officer in Charge (at New Orleans), a District Director at Miami, Operations Advisors and Assistant Commissioners in Washington who were engaged in investigative functions for the Immigration and Naturalization Service, as well as others in the Department of Justice who were engaged in like functions. Paragraph X of the habeas corpus petition (R. 6) is not denied.]

3. The hearing officer may not be responsible to any employee engaged in prosecuting functions for the agency. (The situation noted above obtains here).

4. Officers engaged in investigative functions in any case may not participate or advise in that case or in a factually related case except as a witness or counsel in public proceedings. [Section 242b forbids the special inquiry officer from participating in the same case. If Section 5(c) is applicable, a special inquiry officer may not investigate a factually related case one day and sit in judgment upon that type of case the next. The difficulty in permitting investigation of factually related cases is illustrated by Mr. Justice Jackson in *Saung* v. *McGrath*, 339 U. S. at p. 45, where he stated: "the inspector's duties include investigation of like cases; and while he is today hearing cases in-

vestigated by a colleague, tomorrow his investigation of a case may be heard before the inspector whose case he passes on today."]

5. Officers engaged in prosecuting functions in any case for an agency may not participate in the decision in that case or a factually related case except as a witness or counsel in public proceedings. [Under Section 242(b) a special inquiry officer is directed to present evidence, examine and cross examine the alien and his witnesses. This is probably the dual-examiner exemption from the Administrative Procedure Act referred to by Senator McCarran as the sole digression from that Act, *supra*, p. 29].

The problems raised by this phase of the case are twofold: *First*, whether, in view of Section 12 of the Administrative Procedure Act, section 242(b) or section 5(c) prevails insofar as they are inconsistent. Can there be an implied repeal or exemption when the Administrative Procedure Act requires an express one?

Secondly, insofar as sections 5(c) and 242(b) are not inconsistent, does section 5(c) prevail?

Section 12 of the Administrative Procedure Act is quite specific. There shall be no implied repeals or modifications. Only express exemptions from the Administrative Procedure Act are to be recognized. Congress was aware of this when exemption was proposed for the Immigration Service in H.R. 6652 in the 80th Congress (*supra*, p. 15) and when the Appropriations Rider of 1950 became law (64 Stat. 1044; 8 U.S.C. 155a).

Subsequent inconsistent legislation normally effectuates an implied modification or repeal of earlier legislation. *United States* v. *Yuginovich*, 256 U.S. 450, 463 (1921); *United States* v. *Belt*, 319 U.S. 521 (1943). But, here, Congress, itself, called for an express, not an implied exemption. *National Labor Relations Board* v. *Stacker Mfg. Co.*, 185 F. 2d at 454 (C.A. 3, 1950). Its failure to provide for an express repeal in section 242(b) and its specific removal

of reference therein to the Administrative Procedure Act, reinforce the proud boast of the co-authors of the 1952 Immigration and Nationality Act that "the Administrative Procedure Act prevails now," (98 Cong. Rec. 5778). It "is reinstated in every instance," (98 Cong. Rec. 4302).

This construction that section 5(c) prevails and that the deportation hearing herein is consequently invalid, removes the constitutional objections which we voice below in Point III. This construction conforms to "the duty of federal courts to interpret federal legislation in a manner not inconsistent with the demands of the Constitution," *Dennis* v. *United States*, 341 U.S. 494, 501 (1950) and avoids the fears expressed by Mr. Justice Jackson in *Sung* v. *McGrath*, *supra*, that exemption from the Administrative Procedure Act might bring the Immigration Act "into constitutional jeopardy." In addition, the construction we advocate, is in harmony with the "cardinal principle of construction that repeals by implication are not favored." When there are two acts upon the same subject, the rule is to give effect to both if possible. *United States* v. *Borden*, 308 U.S. 188, 197 (1939); *Rosenberg* v. *United States*, 346 U.S. 273 at 295 (1953); *National Labor Relations Board* v. *Stocker Mfg. Co.*, *supra*.

The Administrative Procedure Act can be interpreted to supplement the requirements of section 242(b), even as 242(b) intended that regulations be promulgated to implement its provisions. Such interpretation would avoid constitutional difficulties, dispense with the disfavored repeal by implication, and give effect to both statutes.

However, if it be assumed that section 242b repealed section 5(c) insofar as the two are inconsistent, we submit, then, that section 5(c) was not repealed for immigration purposes in its entirety. The only possible inconsistency is the dual-examiner exemption noted by Senator McCarran (98 Cong. Rec. 5626). There is no requirement in section 242(b) that special inquiry officers

be subject to those who investigate or prosecute, and upon this ground alone the hearing below was invalid. The argument advanced against this construction is that a full exemption from section 5(c) is granted under 7(a) of the Administrative Procedure Act, or under section 242(b)'s limitation as to sole and exclusive procedure.

(D) *Section 7(a) of the Administrative Procedure Act does not exempt deportation hearings from the requirements of section 5(c).*

The Circuit Court was of the opinion that section 7(a) of the Administrative Procedure Act granted the Immigration Service an exemption from section 5(c) (R. 38).

Section 5(c) of the Act requires separation of investigatory and adjudicatory functions. It exempts the top men in any governmental organization by excepting the agency or any member or members of the body comprising the agency. (*Senate Document 248*, pp. 262, 361).

In his *Manual, on the Administrative Procedure Act* (1947), the Attorney General states at pp. 71-72:

> "The requirements of section 7 are closely integrated with those of section 5(c) (as to certain types of adjudication) and 8 . . . The first sentence of section 7(a) provides that 'There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises an agency or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or in part before boards or other officers specially provided for or designated pursuant to statute' . . . *The last clause of the sentence is designed to permit agencies to continue to utilize hearing officers or boards 'specially provided for by or designated pursuant to statute' . . . Generally, whoever presides at the*

> *hearing (whether an examiner pursuant to section 11, a member of the agency or a special statutory board or hearing officer) is subject to the remaining provisions of the Act.* Sen. Rep. p 21; H. R. Rep. p. 34 (Sen. Doc. pp. 207, 268). However, where a member of the agency acts as presiding officer, the exception in the last clause of section 5(c) applies, with the result that he is not disqualified, as an examiner would be, by previous participation in the investigation of the case." (Italics supplied).

Section 7(a) was not intended to cancel or reduce the application of section 5(c). On the contrary it supplements it.

> "As heretofore stated in connection with sections 4 and 5, the bill requires no hearings unless other statutes contain such a requirement in particular cases of either rule making or adjudication. This section 7, therefore, is merely supplementary to sections 4 or 5 in the relevant cases." *Senate Document* 248 p. 206. See also: pp. 227, 252, 268.

Deportation proceedings are within the exemption of section 7(a) of the Administrative Procedure Act on the assumption that such hearings are required by statute before specially designated officials of the Immigration Service. It is clear however, that special inquiry officers are subject to the prohibitions of section 5(c). They are not the agency or a member of the agency (5 U. S. C. 1001)—the only hearing officers specifically exempt by the Act from the operation of section 5(c). If the Attorney General presided at a deportation hearing, he alone would be exempt. (*Senate Document 248*, p. 262). The provisions of section 7(a) were not designed to exempt hearing examiners from the requirement of section 5(c) which contains its own ex-

ceptions. This is fortified by the legislative history of the Act.

In the Senate Committee Report of 1945, p. 21 (*Senate Document 248, supra*, p. 207) it is stated with reference to Section 7(a):

> "This subsection provides two mutually exclusive methods of hearing—by the agency itself (or one or more of its members) or by subordinate officials. *A third kind of hearing officer recognized in this subsection is one specially provided for or named in other statutes. Whoever presides is subject to the remaining provisions of the bill.*" (Italics supplied.)

And again in the House Committee Report of 1946 it is repeated with reference to all hearing officers recognized in section 7(a) that:

> "Those who so preside are subject to the remaining provisions of the bill." *Senate Document 248, supra*, p. 268.

(E) *Section 242(b) does not set forth the all inclusive procedures for deportation.*

It is said that exemption was accorded from the separation of functions requirement in the recital in section 242(b) that "the procedures so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section." In the original draft (*S. 3455, supra*, p. 16) provision was made for a depertation proceeding before a special inquiry officer, and it was followed by a sentence specifying that "the proceeding so prescribed" shall be the sole and exclusive procedure for determining deportability. The final version contains requirements for Immigration Service regulations as to notice, right to counsel, right to cross examination and evidence. Omitting these and like provisions, the section reads:

"A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine and cross-examine the alien or witnesses and as authorized by the Attorney General, shall make determinations, including orders of deportation. * * * No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. * * * The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. * * *"

Section 101(b)(4) of the Act [66 Stat. 171; 8 U.S.C. 1101 (b) (4), Appendix A, p. 60, *infra*] defines a special inquiry officer as one deemed specially qualified by the Attorney General to conduct proceedings under the Act and authorizes regulations (not inconsistent with the Act) covering the duties and supervision of special inquiry officers.

Obviously, then, section 242(b) was not intended to be all inclusive with regard to deportation procedures. It authorized regulations to implement the Act. Regulations could provide, consistently with the Immigration Act and in the language of section 5(c) of the Administrative Procedure Act that:

No special inquiry officer shall be "responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency."

Then, section 242(b) did not eliminate such requirement of section 5(c), especially if it be recalled that an express modification is necessary under section 5(c) [5 U.S.C. 1011]. In the light of Senator McCarran's remarks, (98 Cong. Rec. 5626) and 5 U.S.C. 1011, it can not be assumed that the Attorney General was given an option whether to comply with the consistent portions of section 5(c) of the Administrative Procedure Act. It should also be observed that no published regulations require a special inquiry officer to be responsible and subject to immigration officials who investigate or prosecute. This commingling of functions continues to exist by reason of a continuation of practices condemned by *Sung* v. *McGrath, supra.*

Under the 1952 Act, the Board of Immigration Appeals is continued *inter alia* for the purpose of hearing appeals in deportation cases, 8 C.F.R. 6.1(b)(2) (1952 Ed.). If the sole and all inclusive method of deporting aliens is set forth in section 242(b), then there is no room for a non-statutory Board of Immigration Appeals nor for certification of deportation cases to the Attorney General, himself, 8 C.F.R. 6.1(h).

Under the 1952 Act the dual examiner function of the special inquiry officer is not considered mandatory. Regulations [8 C.F.R. 242.53(f), 1952 Ed.] permit the assignment of an examining officer to "conduct any required interrogation of the respondent and of the witnesses in behalf of the Government, examine or cross-examine the respondent's witnesses and present witnesses bearing upon the question whether the respondent is subject to deportation." Thus, the Immigration Service, itself, has interpreted section 242(b) to permit utilization of a prosecuting official in addition to a hearing officer—a requirement of the Administrative Procedure Act which we contend is not inconsistent. In fact, such procedure was followed in the instant case (Immigration Transcript, p. 7). This reinforces our

construction that the enumeration of items in section 242(b) is not all inclusive.[3]

With the original bill in mind (*S. 3455*), it is clear that Congress intended that the sole and exclusive method of according an alien a deportation hearing was to be before a special inquiry officer. Other deportation procedures, including the nature of supervision over the special inquiry officer [Section 101(b)(4); 8 U.S.C. 1101(b)(4)], the utilization of examining officers [8 C.F.R. 242.53(f)], the appeal of cases to the Board of Immigration Appeals, and certifications to the Attorney General were not covered by the statute, but left to other rules or regulation. Such a statute was obviously not all inclusive. Such a statute did not repeal the Administrative Procedure Act expressly or by the disfavored method of implication. Such a statute, as we observed before, should be read together with the Administrative Procedure Act to give effect to both (*United States* v. *Borden*, *supra*) and to avoid constitutional jeopardy.

We submit that section 242(b) was not inconsistent with the separation of functions provisions relating to supervisors who investigate or prosecute since it was silent on this issue. Therefore, both acts should be enforced.

III

Commingling of Functions in Deportation Proceedings Denies Due Process and Fails to Conform to the Generally Accepted Standards for Fair Hearings

Apart from the considerations noted in Point II, we sub-

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[3] Unfortunately, the 1952 Immigration Act lacks the preciseness that legislation should have. Professor Max Rheinstein of the Chicago University Law School contends that "it is an abomination on the English language * * * * worse than the Code of Internal Revenue." Former Attorney General McGranery testified that the Act contained numerous ambiguities. *Hearings before the President's Commission on Immigration and Naturalization* (1952) pp. 774, 1350.

mit that the admitted commingling of functions herein, prevented the due process hearing required by the Constitution.

(A) *The requirement of procedural due process in deportation cases.*

Deportation proceedings brought against resident aliens must conform to the Fifth Amendment's requirement of procedural due process. So much is settled by decisions of this Court, *Japanese Immigrant Case,* 189 U.S. 86 (1903); *Kwock Jan Fat* v. *White,* 253 U.S. 454 (1920); *Sung* v. *McGrath,* 339 U.S. 33 (1950); *cf. Jordan* v. *De George,* 341 U.S. 223 (1951); *Kwong Hai Chew* v. *Colding,* 344 U.S. 590, 601 (1953), and so much we understand to be conceded by respondent.

In the *Sung* case, *supra,* the Court held, as a matter of statutory construction, that deportation proceedings must conform to the hearing requirements of the Administrative Procedure Act. One of the factors which the Court regarded as supporting this construction was that an exemption of deportation proceedings from the Act might well be unconstitutional. The Court stated (at 50, 51):

> "Indeed, to so construe the Immigration Act [i.e., so as to make the Administrative Procedure Act inapplicable] might again bring it into constitutional jeopardy. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberty and happiness, and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceed-

> ings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake."

(B) *Procedural due process is an expanding concept which* ***requires observance of "at least currently prevailing standards of impartiality."***

The "currently prevailing standards of impartiality" change, of course, with the times, and inevitably they become more fastidious as civilization advances. "Due process of law" is as old as Magna Charta, but procedures which today are considered indispensable are vastly more refined than those employed in medieval times. The concept of due process still retains the ability to expand, as indicated by contemporary developments in such matters as the admissibility of confessions, the right to representation by counsel, and the right to impartially-selected juries. The situation is summed up in *Wolf* v. *Colorado*, 338 U.S. 25, 27 (1949):

> "Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights."

Accordingly, it is not enough for the Government to urge that the deportation procedure herein was accepted before

the enactment of the Administrative Procedure Act. Procedures which passed muster in the frontier period of the administrative process are not necessarily valid today, any more than the crudities in criminal procedure which characterized the frontier period of the nation's history. What constitutes due process in deportation hearings can not be determined by reference to abstractions, nor apart from the standards which prevail in federal administrative agencies generally. The Administrative Procedure Act did not amend the Constitution, but if it embodies the current standards of impartiality and fairness for administrative proceedings, the quintessence of "what is deemed reasonable and right," then by constitutional compulsion deportation proceedings must conform to the Act's provisions.

(C) *The Administrative Procedure Act embodies the "currently prevailing standards of fairness" in its condemnation of commingling of functions.*

Not all procedural regulations establish standards of impartiality or fairness. Pre-trial, for example, is primarily a device for expedition and efficiency, and is not generally considered to be indispensable to fair play. The Administrative Procedure Act, however, is above every thing else designed to insure fairness in the administrative process. The Act is entitled "An Act to improve the administration of justice by prescribing fair administrative procedure," and the *Sung* opinion (at 36-45) amply documents the legislative history behind this Congressional purpose.

The Act, furthermore, is more than a loose collection of rules of procedure. It lays down general policies and a comprehensive scheme which constitute a basic charter for administrative justice. The Act is a sort of constitution governing the "statutes" which agencies may "enact" to formulate their procedures. Thus, section 5 of the Act

requires timely notice of agency hearings; it leaves to the agencies the prescribing of the number of days for notice and the methods of notification. This charter-like aspect of the Act was fully recognized by its sponsors:

> "The bill, as reported, is not a specification of the details of the administrative procedure, nor is it a codification of administrative law. Instead, out of a long consideration and in the light of the studies heretofore mentioned, there has been framed an outline of minimum basic essentials." (*Report of the Senate Committee on the Judiciary to Accompany S. 7*, Sen. Rep. 752, 79th Cong., 1st Sess., p. 7; *Senate Document 248, supra*, p. 193).
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> "By enacting this bill, the Congress—expressing the will of the people—will be laying down for the guidance of all branches of the Government and all private interests in the country a policy respecting the minimum requirements of fair administrative procedure." (*Id.*, p. 31; *Senate Document 248, supra*, p. 217).
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> "The bill is an outline of minimum essential rights and procedures. Agencies may fill in details, so long as they publish them. It affords private parties a means of knowing what their rights are and how they may protect them while administrators are given a simple framework upon which to base such operations as are subject to the provisions of the bill." (*Report of the House Committee on the Judiciary on S. 7*, H. Rep. 1980, 79th Cong., 2d Sess., pp. 16-17; *Senate Document 248, supra*, pp. 250-251).
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> "Although it (the Act) is brief, it is a comprehensive charter of private liberty, and a solemn undertaking of official fairness. It is intended as a guide to him who seeks fair play and equal rights under law, as well as to those invested with executive authority."

(Foreword by the Chairman of the Senate Committee on the Judiciary, to *Administrative Procedure Act—Legislative History, Senate Document 248*, 79th Cong., 2d Sess., p. iii).

The Administrative Procedure Act, in its historic context, constitutes a legislative rather than judicial recognition that certain reforms, particularly those involving the separation of functions, are essential to elementary fairness in the administrative process under contemporary conditions. This legislative recognition was based on experience, not formulated in the abstract. It was made after more than ten years of exhaustive study and investigation by the legislative and executive branches (*Sung* case at 37-40; *Senate Report 752*, 79th Cong., 1st Session, p. 1; *House Report 1980*, 79th Cong., 2d Sess., p. 7), of a kind and scope which the courts are utterly unequipped to make. It would be irrational for the courts to reject as unfounded this legislative recognition of what is essential to due process in the administrative field.

Even without the legislative recognition, it should now be held in the light of experience and modern research that the due process clause requires separation of the adjudicative and prosecutorial functions in administrative proceedings. Such a holding, if it goes no further than the policies laid down in the Administrative Procedure Act, would still be far short of compelling an insulation comparable to that which applies to the judiciary, even though present-day administrative proceedings often involve issues more vital than many law suits. A hearing officer can neither be, nor appear to be, unbiased if he has investigative and prosecutorial functions in the same or a similar case, and if his employment and advancement are entirely at the mercy of the agency which is a party to the proceeding. It has been authoritatively observed that this natural psychologi-

cal predisposition is particularly pronounced in deportation proceedings:

> "The reason usually urged for separation of the investigating and quasi-judicial functions within an administrative organization is the human difficulty of ridding oneself of commitments on a question after having been engaged on one side of it. This consideration applies with more than ordinary force in deportation hearings. Inspectors, like other human beings, do not want their work to appear fruitless, and are reluctant to conclude that it should go for nothing." (*The Immigration and Naturalization Service, Report of the Secretary of Labor's Committee on Administrative Procedure* (1940), p. 79).
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> "A genuinely impartial hearing, conducted with critical detachment, is psychologically improbable if not impossible, when the presiding officer has at once the responsibility of appraising the strength of the case and of seeking to make it as strong as possible." *Id* at 82.
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> "These types of commingling of functions of investigation with the function of deciding are thus plainly undesirable." *Report, Attorney General's Committee on Administrative Procedure*, 56 (1941). *Senate Document 8*, 77th Congress, 1st Session.
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> " • • • the same men are obliged to serve both as prosecutors and judges. This not only undermines judicial fairness; it weakens public confidence in that fairness." *Administrative Management in the Government of the United States, Report of the President's Committee on Administrative Management*, 36-37 (1937).
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> "One person to prosecute and judge, a person who through training, experience and present function has

acquired attitudes adverse to the accused party—such a person seems ill-qualified to pass upon rights so numerically significant and individually vital as the rights involved in deportation. Far from reflecting upon the Service or its personnel, such a statement is simply a recognition of a basic limitation on human nature. After all, the essential task of the Service is to detect and deport. It is no more surprising that its officers are not prepared to preside impartially than that the members of a police force are ill suited to sit in judgment on the suspects they arrest." *Deportation and Due Process*, 5 Stanford Law Review, July 1953, pp. 737-8.

See also: *Our Immigration Laws, A Continuing Affront to the Administrative Procedure Act*, 41 Georgetown Law Review 364 (1953); *Developments in the Law—Immigration and Nationality*, 66 Harvard Law Review at 693 (1953).

Prior to the Administrative Procedure Act the courts found commingling of functions in deportation cases "unfortunate and subject to criticism," *Palmer* v. *Ultimo*, 69 F. 2d 1, 2 (C.A. 7, 1934) *cert. denied*, 293 U.S. 570 (1934), a procedure to which it was "difficult * * * to adjust" *Ex parte Kwan So*, 211 Fed. 772, 773 (N.D. Cal., 1913). Judge Learned Hand observed in *U.S. ex rel. Iorio* v. *Day*, 34 F. 2d 920, 922 (C.A. 2, 1929):

"The record discloses a very lax regard for the fundamentals of a fair hearing. * * * the attitude of the examiner, the introduction of confused and voluminous evidence taken elsewhere, the strong indication that appellant was vaguely regarded as undesirable, and that deportation was thought the easiest way to get rid of him and to avoid the normal processes of the law—*all these warn us of the dangers inherent in a*

system where prosecutor and judge are one and the ordinary rules which protect the accused are in abeyance." (Italics supplied)

Judicial decisions of this Court already foreshadow for acceptance as due process the principle of separation of functions. In *Tumey* v. *Ohio*, 273 U.S. 510 (1927), the personal pecuniary interest of the magistrate in the outcome of the trial was only one basis for the Court's finding of a denial of due process. Equally offensive was the fact that the magistrate's dual role as mayor supplied a separate official concern in the benefit his community would derive from imposition of a fine. (See at 532-534.) One of the reasons advanced by Mr. Justice Rutledge for condemning the Michigan one-man grand jury was that it combined in a "single official the historically separate powers of grand jury, committing magistrate, prosecutor, trial judge and petit jury." *Re Oliver*, 333 U.S. 257, 278 (1948). In *Morgan* v. *United States*, 304 U.S. 1, 22 (1937), one of the objectionable factors in the process of administrative decision was that the Secretary of Agriculture accepted, after ex parte consultation with subordinate officials, findings "prepared by the active prosecutors for the Government."

We urge, therefore, that failure to separate functions in deportation proceedings as required by section 5(c) of the Administrative Procedure Act, violates due process as that concept has evolved today.

(D) *Commingling of functions in deportation cases violates currently accepted standards of fairness.*

The courts below found that section 242(b) provides due process of law, although it varied from the Administrative Procedure Act (R. 22, 39). Implicit in their decisions is the finding that separation of functions is not required by currently prevailing standards of fairness.

To the contrary, is the conclusion reached in the *Report*

of the President's Commission on Immigration and Naturalization, Whom We Shall Welcome (1953) which states at pages 161-162:

> "A striking phenomenon in the jurisprudence of our day has been the crystallization of concepts for fair dealing in the administrative process. These concepts have been formulated by scholars, by the legal profession, by official studies, by the courts, and in the legislatures. They have included a universal condemnation of the situation in which one official or group of officials acts as investigator, prosecutor, and judge. This practice has been characterized as obnoxious to elementary standards of fair procedure.
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> "Those who have appraised the immigration process likewise have condemned its mixture of prosecuting and adjudicative functions. They have described it as a roadblock to impartial consideration. The Supreme Court said recently that the administrative deportation hearing is 'a perfect exemplification of the practices so universally condemned.' But the attainment of insulation between prosecution and adjudication has been resisted and is today not yet a reality. The deportation process, although it touches countless human lives, thus has lagged behind other aspects of administrative justice. The major burden of the testimony of the American Bar Association was to urge the application of the Administrative Procedure Act to deportation proceedings.
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> "*The present hearing procedure in deportation and exclusion cases fails to conform to the now generally accepted standards for fair hearings.* The normal practice in both exclusion and deportation cases under the act of 1952, is to have the entire proceeding conducted

by a special inquiry officer who acts both as prosecutor and judge. Furthermore, officers normally performing investigating and prosecuting duties are authorized to conduct immigration hearings.

"Another major facet of the Administrative Procedure Act is the removal of hearing examiners from the supervision of officers performing prosecuting and investigative functions. This goal likewise is not fully met by current immigration practices. Even full-time hearing officers are subject to the immediate supervision of the district director of the Immigration and Naturalization Service in administrative arrangements at the local level, and to over-all policy supervision of the assistant commissioner in charge of the inspections and examinations division. Both of these officials are concerned with enforcement. Under such an arrangement the hearing officer inevitably will tend to tailor his determinations to the wishes of his superior officers, whose sphere of action encompasses enforcement duties."

All major agencies of the Government now follow section 5 of the Administrative Procedure Act except the Immigration Service. Included are the Interstate Commerce Commission, *Riss & Co.* v. *United States*, 341 U.S. 907 (1951); the Post Office Department, *Cates* v. *Haderlein*, 342 U.S. 804 (1951); the Federal Power Commission, *Colorado Interstate Gas Co.*, 1 Pike & Fischer Ad. Law 2d 309, 310 (1951); the Civil Service Commission, in its enforcement of the Hatch Act, *Matter of James J. Murphy*, 2 Pike & Fischer Ad. Law 2d 284 (1952); the Securities Exchange Commission, *Eastern Utilities Associates* v. *Securities Exchange Commission*, 162 F. 2d 385 (C. A. 1, 1947); the Civil Aeronautics Board, *Kuhn* v. *Civil Aeronautics Board*, 183 F. 2d 839 (C. A. D. C., 1950); the National Labor Relations Board, *National Labor Relations Board* v. *Stocker Mfg. Co.*,

185 F. 2d 451 (C. A. 3, 1950); the Federal Communications Commission, [see: *Democrat Printing Co.* v. *Federal Communications Commission*, 202 F. 2d 298 (C. A. D. C. 1952)]; and the Federal Trade Commission, [see: *Luria Brothers & Co.*, 4 Pike & Fischer Ad. Law 2d 475 (1954)].

More cogent are the reasons for requiring separation of functions in a deportation proceeding where risks are greater, involving "loss of both property and life; or of all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U.S. 276, 285 (1921). Here the evil of commingling, "if objectionable anywhere, would seem to be particularly so * * * ." *Sung* v. *McGrath*, 339 U.S. at 46. Here, if fair administrative procedure is to obtain in conformity with our present day concepts of due process, the prosecutor sitting as a judge, and the judge subject to the control of those who investigate and prosecute, cannot be tolerated.

IV

Deportation Upon this Record Offends the Ex Post Facto Prohibition

We recognize, in approaching the issue of *ex post facto* as applied to deportation, that "the slate is not clean." *Galvan* v. *Press*, 347 U.S. 522, 531 (1954). The slate was not clean, however, when this Court overturned a precedent of ninety-five years standing in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1937). This Court's reversals in *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937), *Jones* v. *Opelika*, 319 U.S. 103 (1943), *Board of Education* v. Barnette, 319 U.S. 624 (1943), *Smith* v. *Allright*, 321 U.S. 649 (1944), and *Girouard* v. *United States*, 328 U.S. 61 (1946)—to mention only a few of the 30 cases in this category,[4] all point to the view of Mr. Justice Holmes and Mr. Justice Brandeis that "no lapse of time or respectable ar-

[4] 21 involved constitutional issues. William O. Douglas, *An Almanac of Liberty*, p. 48 (1954).

ray of opinion shall make the Court hesitate to correct an unconstitutional assumption of power by the Courts of the United States." *Erie Railroad* v. *Tompkins, supra,* at p. 79. It is with this thought that we respectfully seek reconsideration of the *ex post facto* problem. We also regard most, if not all prior statements as *dicta* or decisions based upon *dicta*. Here, too, unlike *Galvan* v. *Press, supra,* and *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 593 (1952), the petitioner had no advance warning that his conduct would be considered a deportable offense. (See: Gov't Brief, *Galvan* v. *Press*, pp. 62-63).

Here, it is sought, not to jail petitioner for past misconduct for which he has paid his penalty, but to do much more—to perpetually deprive him of his right to live in the United States with his American wife and four American born children. Petitioner is to be sent into permanent exile for past misconduct which did not constitute a deportable offense in 1938 when committed (R. 56).

Violation of the Marihauna Act of 1937 did not become a deportable offense until June 28, 1940 when the Alien Registration Act of 1940 (54 Stat. 673) was enacted. That law specifically provided that it was inapplicable to "any act committed prior to the date of the enactment of this Act." Section 403(39) of the 1952 Immigration Act (66 Stat. 280) repealed this provision of the Alien Registration Act. At the same time, the 1952 Act in a broad savings clause preserved "any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect" unless otherwise specifically provided. (section 405, 66 Stat. 280; 8 U.S.C. 1101 note) Under the savings clause, petitioner's right to permanent residence is preserved [see: *Bertoldi* v. *McGrath*, 178 F. 2d 977, (C.A.D.C. 1949)] unless it is otherwise specifically provided. Section 241(d) of the 1952 Act [8 U.S.C. 1251(d)]

can be read consistently with the savings clause by giving it retroactive effect only to June 28, 1940, the date when marihauna violations became deportable offenses. We question whether it is specifically provided in the Act that those who had a non-deportable status under the Alien Registration Act of 1940 became deportable under the 1952 Act [See: *U.S. ex rel De Luca* v. *O'Rourke*, 213 F. 2d 759 (C.A. 8, 1954)]. In view of the penal nature of deportation statutes, the retroactive application here sought by the Government should not be favored. Cf. *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948).

However, if it be concluded that petitioner is deportable by a 1952 statute for previously non-deportable conduct which occurred 15 years ago, then it is clear that petitioner was not forwarned like *Harisiades* or *Galvan*. As Mr. Justice Jackson noted in the *Harisiades* case, these aliens were "adequately forewarned both that their conduct was prohibited and of its consequences," 342 U.S. at 593. Both joined the Communist Party at a time when such membership was a deportable offense.

No such situation exists here. Here, without any forewarning, in 1952, it is sought to deport petitioner for non-deportable conduct in 1938. Can such arbitrary and despotic application of our deportation law be defended upon the ground that deportation is a civil proceeding? Is form rather than substance to be the controlling factor?

(A) *The ex post facto prohibition forbids retroactive civil legislation.*

Some foreign countries, like Norway, Mexico, Portugal and Brazil, have express constitutional provisions forbidding all retroactive laws. (II *Dodd, Modern Constitutions*, 141, 42, 175; I *ibid*, 153). Article 43 of the 1921 Constitution of the Irish Free State—a provision reaffirmed in its 1937 Constitution—likewise prohibits retroactive civil and criminal legislation.

In ordinary usage among laymen and lawyers in English speaking countries, the accepted meaning of *ex post facto* encompasses civil as well as criminal matters. *Oxford Universal English Dictionary; Webster's New International Dictionary; Funk and Wagnalls New Standard Dictionary; Osborn, A Concise Law Dictionary for Students and Practitioners (London); Byrnes, Law Dictionary; Aiyar, The Law Lexicon of British India; Bell, South African Legal Dictionary; Black's Law Dictionary; Bouvier, Law Dictionary.*

At common law, in England and in this country, the phrase *ex post facto* was utilized to denote civil matters. *Wilkinson* v. *Meyer*, 2 Raymond 1350, 1352; *Sir Francis Bacon, Elements of the Common Law* (1639), *Maxim 21*, pp. 74, 78; 1 *Sheppard's Touchstone* 63, 70, 73; 1 *Cooley's Blackstone*, 4th Ed. pp. 682, 726.

Legal scholars, including Professors William W. Crosskey, Breck McAllister, O. P. Field and B. T. DWitt, who have thoroughly investigated the intention of the framers of the Constitution and the views prevailing at the time, have all concurred that the *ex post facto* prohibition of Article 1, Section 9, was designed to cover civil matters.

Professor Crosskey in a chapter, entitled, "The True Meaning of the Ex Post Facto Clauses" (1 *Politics and the Constitution* 324) observes that the debates during the Constitutional Convention,[5] periodicals,[6] law books,[7] and

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[5] *Crosskey, ibid*, pp. 332-339.

[6] *Crosskey, ibid*, pp. 326-329, citing: The New Jersey Gazette, March 2, 1784; Freeman's Journal, September 7, 1785; Political Intelligencer and New Jersey Advertiser, January 4, 1786; The Massachusetts Centinel, February 11, 1786; The Independent Chronicle, May 31, 1787; The Massachusetts Centinel, November 28, 1787; The Virginia Independent Chronicle, March 19, 1788; The Columbian Herald, February 4, 1788.

[7] *Crosskey, ibid*, pp. 330-331, citing: Giles Jacob's *Law Dictionary* (1739); Sheppard, *Touchstone of Common Assurances* (7th Ed; London, 1820) I, 63, 67 and 68; II, 234, 250, 267, 372; Fearne, *An Essay on Contingent Remainders* (8th Ed; London, 1824), 274, 362; Powell, *An Essay Upon the Learning of Devises* (London, 1788), 113, 133, 134;

decided cases[8] antedating and immediately following the Constitutional Convention all gave *ex post facto* a civil connotation.

Writing in 15 *California Law Review* 269, 270 Prof. Breck McAllister of the University of Washington asserts:

> "Two writers after extensive examination of the records of the Constitutional Convention of 1787 and of the state ratifying conventions, have concluded that the phrase ex post facto was not used in the technical sense of a prohibition against criminal retroactive laws, but was intended to supplement the clause prohibiting the states from impairing the obligation of contracts, as a prohibition against all retroactive legislation. *The real mischief aimed at, it is pointed out, was retroactive civil legislation.*"

Prof. McAllister also advances the theory that *Calder* v. *Bull* incorrectly analyzed the problem because it was decided in 1798 and the records of the Constitutional Convention were not published until 1819. The two writings referred to by Prof. McAllister were articles by Prof. O. P. Field of the University of Indiana in 20 *Michigan Law Review* 315 (reprinted in 2 *Select Essays on the Constitutional Law* 1337) and by B. T. DeWitt in 15 *Political Science Quarterly* 96.

B. T. DeWitt in 15 *Political Science Quarterly* 96 at page 97 points out that:

> "It is equally manifest that the original intention of the convention in adopting Article 1, Section 9 that 'no bill of attainder or ex post facto law shall be

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Wooddeson, *A Systematical View of the Laws of England* (London, 1792), II, 641; Blackstone, I, 46.

[8] *Crosskey, ibid.*, pp. 330, 339-342, citing: *Wilkinson* v. *Meyer*, 2 Ld Raym 1350, 1352 (1724); *Turner* v. *Turner's Executrix*, 4 Call (Va) 234, 237 (1792); *Elliot's Executor* v. *Lyell*, 3 Call (Va) 268, 286 (1802); *Den* v. *Goldtrap*, 1 N. J. L. 315, 319 (1795).

passed' was to forbid the impairment of the obligations of contracts by national legislation."

DeWitt further relates at page 103 that "Blackstone uses *ex post facto* more frequently of matters relating to property rights and civil proceedings than of matters relating to crimes and criminal proceedings" (Citing Cooley's Blackstone Volume 1, Book II, Ch. 20, pp. 682, 701, par. 308, 334; Ch. 22, p. 726, par. 368).

In the debates during the Constitutional Convention, George Mason remarked:

> "* * * I conceive that, according to the common acceptation of the word, *ex post facto* laws and retrospective laws are synonymous terms." III *Elliot's Debates* 479.[9]

Story on the Constitution (5th Ed) states at pp. 218-219:

> "The terms *ex post facto* laws, in a comprehensive sense, embrace all retrospective laws or laws governing or controlling past transactions, whether they are of a civil or criminal nature. And there have not been wanting learned minds, that have contended, with no small force of authority and reasoning, that such ought to be the interpretation of the terms in the Constitution of the United States. As an original question, the argument would be entitled to grave consideration * * *".

There are Supreme Court *dicta* and cases relying upon *dicta* which say that the *ex post facto* provisions are inapplicable on the ground that the prohibition applies only to criminal statutes. These cases will be analyzed below.

Calder v. *Bull*, 3 Dall 386 (1798), was the first *ex post facto* decision of the Supreme Court. It upheld the right

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[9] For the background which provoked this discussion, see *Crosskey, ibid.*, pp. 332-339.

of the Connecticut legislature to set aside a court decree disallowing the probate of a will. The resolution of the legislature granted a new trial. In the course of its opinion the Supreme Court stated that the *ex post facto* prohibition was confined to criminal legislation. It may be noted that in 1798, is was assumed by the majority of the Court that a bill of attainder likewise applied only to criminal matters and that the two phrases, bill of attainder and *ex post facto*, enumerated criminal prohibitions exclusively.

[Note Mr. Justice Johnson's remarks, at 2 Peters 686 *infra*, and compare *Lovett* v. *United States*, 328 U. S. 303 (1946)]

Samuel Corwin in his biography, *John Marshall and the Constitution*, describes Chief Justice Marshall's displeasure with the decision in *Calder* v. *Bull* and states at p. 150:

> "The decision roused sharp criticism and the judges themselves seem fairly to repent of it even in handing it down."

In *Fletcher* v. *Peck*, 6 Cranch 87 (1810) at 138-139, Chief Justice Marshall clearly indicated that he considered both the bill of attainder and *ex post facto* prohibition applicable to civil legislation. He there stated:

> "This rescinding act would have the effect of an *ex post facto* law. . . . This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant."

And, in a special appendix to *Satterlee* v. *Matthewson*, 2 Peters 414 (1829) at p. 681 (7 Law Ed. 561) Mr. Justice Johnson[10] described the language in *Calder* v. *Bull* as dicta and devoted four pages to establish that the *ex post facto*

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[10] See also: *Justice William Johnson* by Donald G. Morgan (1954) at pp. 223-226.

prohibition applied to civil proceedings. He stated at page 682:

> "I then have a right to deny that the construction intimated by three judges in the case of Calder v. Bull is entitled to the weight of an adjudication. Nor is it immaterial to observe that an adjudication upon a fundamental law ought never to be irrevocably settled by a decision that is not necessary and explicit.
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> "That the phrase 'ex post facto' is not confined in its ordinary signification to criminal law or criminal statutes admits of positive demonstration."

Mr. Justice Johnson then traced the common law history of *ex post facto* and gave instances where at common law it had been used in connection with civil matters.

See also:

Ogden v. *Saunders*, 12 Wheat. 213, 286 (1827);
Dartmouth College v. *Woodward*, 4 Wheat. 518, 578, Note 7 (1819).

The real mischief in *ex post facto* legislation is the unfairness of its retroactive provisions. It is just as unfair to punish someone retrospectively and *nunc pro tunc* for past conduct criminally as it is to punish him under our civil laws. It is therefore not surprising that the Supreme Court itself declined to follow *Calder* v. *Bull* after the Civil War when three cases arose.

The first case was *Cummings* v. *Missouri*, 4 Wall. 277 (1868), which involved a provision of the Missouri Constitution of 1865 to the effect that no person should practice as an attorney or clergyman unless he took a prescribed oath that he had not engaged in hostility against or been disloyal to the United States. Cummings was a Catholic

priest who was convicted by the Missouri court of preaching without having taken the prescribed oath. The court specifically held that the requirement of a loyalty oath as to past conduct was *ex post facto* (4 Wall 326, 377) as well as a bill of attainder (4 Wall 323, 377). In so doing it specifically held that these constitutional provisions applied to civil proceedings (4 Wall 326, 327).

In the second case, *Ex Parte Garland*, 4 Wall 333 (1867), there was involved the constitutionality of a Federal statute which required an individual to swear as to his past loyalty in order to practice as an attorney in the Federal courts. Garland, a member of the Confederate Congress, applied to the Supreme Court for permission to continue to practice law without taking the oath. The Court held that this provision was unconstitutional both upon the ground that it was a bill of attainder (4 Wall 377) and *ex post facto* (4 Wall 377, 378).

In both cases, dissenting opinions were recorded (4 Wall 333, 382) on the ground that under *Calder* v. *Bull ex post facto was confined to criminal proceedings* (4 Wall 390, 391).

In the third case, *Pierce* v. *Carskadon*, 16 Wall 234, 239 (1873), a statute required the taking of a loyalty oath to secure a rehearing in civil litigation. The Court relying upon the *Cummings* and *Garland* cases held the law unconstitutional.

There can be little doubt that these three court decisions which followed *Calder* v. *Bull* were square rulings inconsistent with the ruling in that early case. The *Cummings* and *Garland* cases, if recognized today, overrule the decision in *Calder* v. *Bull*. And, in *Lovett* v. *United States*, 328 U. S. 303 (1946) and *Garner* v. *Board of Public Works*, 341 U. S. 716, (1951) decisions on Article 1, Section 9 (3) of the Constitution, this Court specifically acknowledged that the *Cummings* and *Garland* cases represented a correct state-

ment of the law today. The *Lovett* case, it is true, dealt exclusively with bills of attainder, but significantly, the court held that the constitutional prohibition Article 1, Section 9 (3) related to civil matters. A bill of attainder is a legislative act which inflicts punishment and it necessarily operates on past facts. For that reason the early cases like the *Cummings* and *Garland* cases made no distinction between *ex post facto* and *bills of attainder*. The reaffirmation of the *Cummings* and *Garland* cases in the *Lovett* and *Garner* cases, clearly indicates that the Supreme Court regards that both prohibitions relate to civil matters.

In *The Settler Within Our Gates*, by Boudin, 26 N.Y.U. Law Review 634 (1951) and 52 *Yale Law Journal*, 116, 117, the Supreme Court *dicta*, usually relied upon for restricting *ex post facto* to criminal cases are analyzed.

It will be observed that these authorities were *dicta* and unnecessary to the case holdings.

In *Johannessen* v. *United States*, 225 U. S. 227 (1912), denaturalization because of fraud and not deportation was involved. Taking something away from a man to which he was never entitled does not involve *ex post facto* legislation. In like manner, application of the 1917 Immigration Act to aliens who entered illegally prior to its effective date and who never had legal permanent residence, merely deprives them of something to which they were never entitled and is not *ex post facto*. *Lauria* v. *United States*, 271 Fed. 261, (C.A. 2, 1921) *cert. denied*, 257 U. S. 635; *U. S. ex rel. David* v. *Tod*, 289 Fed. 60 (C.A. 2, 1923); *Sit Sing Kum* v. *United Stat* 277 Fed. 191 (C.A. 2, 1921); *Mon Singh* v. *White*, 274 Fed. 513 (C.A. 9, 1921); *Hughes* v. *Tropello*, 296 Fed. 306 (C.A. 3, 1924); *Ono* v. *United States*, 267 Fed. 359 (C.A. 9, 1920).

Bugajewitz v. *Adams*, 228 U. S. 585 (1913), involved deportation of an alien *presently* practicing prostitution. No *ex-post facto* question was presented. In *Mahler* v. *Eby*, 264 U. S. 32 (1924), the case was remanded because the Secre-

tary of Labor failed to make a finding that the alien was presently undesirable. Deportation of an alien held to be undesirable today involves no *ex post facto* feature.

It will be observed that in *Mahler* v. *Eby*, *supra*, both the court and the government relied upon *Hawker* v. *New York*, 170 U. S. 189 (1898) for the proposition that the statute did not contravene the *ex post facto* prohibition (Gov't brief p. 5). In addition, it may be noticed that counsel for the alien completely abandoned the argument that the statute was *ex post facto* in his brief before this court.

The *dicta* in the foregoing cases cannot be regarded as controlling. In reviewing these authorities 52 *Yale Law Journal* 116 concludes:

> "Although some cases have said that a criminal penalty must be involved, the weight of authority, relying on *Ex Parte Garland* and *Cummings* v. *Missouri*, has asserted the more reasonable view that mere punishment of whatever nature is the criterion."

Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952), relying upon the *dicta* of foregoing cases refused to reconsider the *ex post facto* prohibition upon the grounds that the aliens concerned had been forewarned, and Congress had determined to deport past members of the Communist Party because of the difficulty in selecting true repenters. (342 U.S. at 593 and 595).

Galvan v. *Press*, 347 U.S. 522 (1954), like *Harisiades* involved an alien who was forewarned. He was a member of the Communist Party from 1944 to 1946 when past and present membership in a subversive organization was a deportable offense. The Internal Security Act of 1950 changed rules of evidence, dispensing with the necessity of proving the character of the Communist Party. Such change affected no substantial rights, and like retroactive changes in rules of procedure, *Beazell* v. *Ohio*, 269 U.S. 167 (1925), may properly be sustained on that ground.

Here, however, there was no deportable offense at the time of commission. Here, there was no forewarning. Here, retroactively, a sanction is being imposed far greater than the criminal penalty which petitioner paid in 1938.

(B) *Deportation involves punishment within the ex post facto prohibition.*

Although it has frequently been stated that *ex post facto* relates solely to criminal matters, many of our leading writers on the subject recognize the inaccuracy of such statements.

Burdick, in *The Law of the American Constitution*, states at page 449:

> "A statute may be ex post facto though not penal in form if its sole purpose is to inflict a penalty upon persons for past acts."

1 *Cooley's Constitutional Limitations* (Eighth Ed.) 544-545 recognizes that:

> "It is not essential however, in oder to render a law invalid on these grounds, that it should expressly assume the action to which it relates to be criminal; or provide for punishment on that ground. * * * if it deprives a party of any valuable right—like the right to follow a lawful calling—for acts which were innocent, or at least not punishable by law when committed, the law will be ex post facto—in the constitutional sense, notwithstanding it does not in terms declare the acts to which the penalty is attached criminal."

Rottschaefer, American Constitution Law, at 769, 770 declares:

> "It has been stated that punishment also includes depriving one of his civil or political rights."

In *Calder* v. *Bull, supra*, Mr. Justice Chase acknowledged that *ex post facto* encompassed legislative judgments which

"inflicted punishments, where the party was not by law liable to any punishment." And in footnote 3 of his opinion, he cited the banishments of Lord Clarendon and of the Bishop of Atterbury.

In *Cummings* v. *Missouri* and *Ex Parte Garland*, *supra*, the Supreme Court held the deprivation of the right to practice one's profession involved punishment. In the *Cummings* case, the court said that (4 Wall. 320 332, 324, 325):

> "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.
>
> • • • • •
>
> "'*Some punishments*', says *Blackstone*, '*consist of exile or banishment, by abjuration of the realm or transportation, others in loss of liberty. . . .*'
>
> • • • • •
>
> "The theory upon which our political institutions rest is that all men have certain inalienable rights—that among them are life, liberty and the pursuit of happiness. . . . Any deprivation or suspension of any of these rights for past misconduct is punishment, and can be in no otherwise defined.
>
> • • • • •
>
> "The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the right of the citizen should be secure against deprivation for past misconduct by legislative enactment, under any form however disguised." (Italics supplied).

In *Bridges* v. *Wixon*, 326 U.S. 135 (1945), Mr. Justice Douglas speaking for the majority stated:

"It must be remembered that although deportation technically is not criminal punishment (*Johannessen* v. *United States*, 225 U.S. 227, 242; *Bugajewitz* v. *Adams*, 228 U. S. 585, 591; *Makler* v. *Eby*, 264 U. S. 32, 39) it may nevertheless visit as a great a hardship as the deprivation of the right to pursue a vocation or a calling. Cf. *Cummings* v. *Missouri*, 4 Wall. 277; *Ex Parte Garland*, 4 Wall. 333. As stated by Justice Brandeis speaking for the Court in *Ng Fung Ho* v. *White*, 259 U. S. 276, 284, deportation may result in the loss 'of all 'hat makes life worth living' ".

* * * * *

"Here the liberty of an individual is at stake. . . . Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. *That deportation is a penalty—at times a most serious one—cannot be doubted.*"

More recently in *Delgadillo* v. *Carmichael*, 332 U. S. 388 (1947), Mr. Justice Douglas stated that:

"Deportation can be the equivalent of banishment or exile. . . . The stakes are indeed high and momentous for the alien who has acquired residence here."

See also: *Fong Haw Tan* v. *Phelan*, 333 U. S. 10 (1948).

In *Ng Fung Ho* v. *White*, 259 U. S. 276, 285 (1921) Mr. Justice Brandeis said that deportation

"may result also in loss of both property and life; or of all that makes life worth living."

Wallis v. *Tecchio*, 65 F. 2d 250, 252 (C. A. 5, 1933) states that:

> "The statute in its effect upon the individual must be classified as penal. . . . We regard forfeiture for misconduct of the privilege of an existing residence in the United States as a penalty."

In U. S. *ex rel Klonis* v. *Davis*, 13 F. 2d 630 (C. A. 2, 1926) it was again said:

> "However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples. Such, indeed, it would be to anyone."

In *Sung* v. *McGrath*, 339 U.S. 33 (1950), Mr. Justice Jackson declared, that:

> "A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself."

Chief Justice Vinson, speaking for the Court, stated in *Jordan* v. *DeGeorge*, 341 U. S. 223 (1951),

> "The Court has stated that deportation is a drastic measure and at times the equivalent of banishment or exile. . . . It is the forfeiture for misconduct of a residence in this country. *Such forfeiture is a penalty. Fong Haw Tan* v. *Phelan* 333 U. S. 6, 92 L. Ed. 433, 68 S. Ct. 374, supra." (Italics supplied).

Can there be any doubt that under the foregoing authorities that the deportation of petitioner who came here as a baby at the age of 8 months would be a penalty and punishment? Would not petitioner prefer being sent to jail for another year under *ex post facto* criminal legislation, rather than being punished *ex post facto* by perpetual exile from his family, his home, his job and the land where he has

resided for over forty years? Of what value is it to surround petitioner with constitutional guarantees of due process if he may be summarily and arbitrarily deported under retrospective legislation?

The provisions of the Constitution, said Mr. Justice Holmes: "are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." *Gompers* v. *United States*, 233 U. S. 604, 610 (1914).

> "The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name." *Cummings* v. *Missouri*, 4 Wall 329 (1867).
>
> "Nothing is more certain in modern society than the prinicple that there are no absolutes, that a name, a phrase, a standard, has meaning only when associated with the considerations which gave birth to the nomenclature." *Dennis et al.* v. *United States*, 341 U. S. at 508 (1951).
>
> "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." Holmes, J. dissenting in *Hude* v. *United States*, 225 U. S. 347 at 391 (1912).

We seek to provoke further analysis of the *ex post facto* problem, herein, because we believe that reliance upon the erroneous *dicta* of the past should be replaced by an evaluation of the true meaning of *ex post facto* as intended by the constitutional draftsmen. That evaluation will show that historically, the *ex post facto* prohibition was designed to cover civil matters and, therefore, should encompass the instant case. However, even if retroactive punishment be necessary for invocation of the pro-

hibition, realistically, considering substance rather than form, exile and banishment is one of the severest punishments which can be visited retroactively or otherwise upon an individual. We submit that a reconsideration of the problem here posed leads inevitably to the conclusion that the statute herein offends the *ex post facto* prohibition of the Constitution.

Conclusion

Petitioner has been ordered deported after prejudgment of his case, at a hearing, where the impartiality of the hearing officer was influenced by newspaper headlines inspired by his superiors. In addition, the hearing officer, a prosecuting judge, was subject to the control of superiors who engaged in investigative and prosecuting functions, contrary to the applicable provisions of the Administrative Procedure Act and currently prevailing standards of fairness. This was the type of hearing accorded to petitioner, resident here for 43 years since the age of 8 months, to determine whether he be exiled or permitted to remain here with his American wife and four American born children. This was the background for punishing petitioner in 1953 by *ex post facto* legislation for a non-deportable offense committed more than fifteen years ago.

If the fundamental principles of fairness are to govern our laws, neither the hearing, nor the legislative enactment involved herein can be allowed to stand.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Article I, Section 9, Clause 3, of the Constitution provides:

> "No bill of attainder or ex post facto law shall be passed."

The Immigration and Nationality Act of 1952, 66 Stat. 163 *et seq.* provides in pertinent part:

Section 241, 66 Stat. 204, 8 U. S. C. 1251:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction sustaining opiate;
>
> * * * * *

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

* * * * *

Section 242(b), 66 Stat. 209, 8 U. S. C. 1252:

A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceedings, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a de-

termination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. • • •

Section 101(b)(4), 66 Stat. 171, 8 U. S. C. 1101(b)(4):

The term "special inquiry officer" means any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings, in whole or in part, required by this Act to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or by regulation, to conduct such proceedings. Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this Act, as the Attorney General shall prescribe.

Section 244, 66 Stat. 214, 8 U. S. C. 1254:

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—

• • • • •

(5) is deportable under paragraph • • • (11) • • • of section 241(a) for an act committed or status acquired subsequent to such entry into the United States • • •; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has

not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.

Section 403, 66 Stat. 279:

(a) The following Acts and all amendments thereto and parts of Acts and all amendments thereto are repealed:

* * * * *

(47) The paragraph headed "General provisions—Department of Justice" in Chapter III of the Supplemental Appropriation Act, 1951 (Public Law 843, Eighty-first Congress);

Section 405, 66 Stat. 280:

"Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing at the time this Act shall take

effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *"

The Administrative Procedure Act, 60 Stat. 237 *et seq.* provides in pertinent part:

Section 5(c), 60 Stat. 240, 5 U. S. C. 1004(c):

"* * * Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. * * *

Section 7, 60 Stat. 241, 5 U. S. C. 1006:

"In hearings which section 4 or 5 requires to be conducted pursuant to this section —

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole

or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. * * *

Section 12, 60 Stat. 244, 5 U. S. C. 1011:

"* * * No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. * * *"

The Act of September 27, 1950 (Supplemental Appropriations Act of 1951), 64 Stat. 1044, 1048 (8 U. S. C. 155a), provides:

Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7, and 8 of the Administrative Procedure Act (5 U. S. C. 1004, 1006, 1007).

Code of Federal Regulations, 8 C. F. R., § 242.53(f) [1952 Ed.] provides as follows:

"*Assignment of examining officer in addition to special inquiry officer; duties of examining officer.* Prior to the commencement of a hearing, or during the course of a hearing upon the request of the special inquiry officer presiding at such hearing, the district director or the officer in charge having administrative jurisdiction over the place where the proceedings are pending, in his discretion, may assign an immigration officer to act at the hearing as the examining officer. The examining officer shall in such case conduct any required interrogation of the respondent and of the witnesses in behalf of the Government, examine or cross-examine the respondent's witnesses and present evidence bearing upon the

question whether the respondent is subject to deportation. Except as provided in §§ 242.74 and 242.75, he shall lodge such additional charges as he may find to be applicable and, if the respondent has applied for relief from deportation, inquire thoroughly into the respondent's eligibility for relief requested, and develop such other information as may be pertinent to the proper disposition of the case. The assignment of an examining officer shall not impair the authority conferred by the Immigration and Nationality Act or this chapter upon the special inquiry officer presiding at such hearing."

APPENDIX B

For Immediate Release, Tuesday, December 30, 1954

DEPARTMENT OF JUSTICE

Attorney General James P. McGranery announced today that Carlos Marcello of Miami, Florida, and Jefferson Parish, Louisiana, has been arrested on a deportation warrant by the Immigration and Naturalization Service.

The arrest in New Orleans was the first major deportation move undertaken since the new Immigration and Nationality Act became effective December 24, 1952. The action was another step in the Attorney General's program of denaturalization and/or deportation of undesirable persons of foreign birth who are engaged in racketeering or other criminal activities.

Marcello, born February 6, 1910, in Tunis, Africa, entered the United States for permanent residence October 7, 1910, at New Orleans.

He allegedly is engaged in large-scale slot machine operations and other gambling activities in Louisiana.

The deportation warrant was based on his conviction in

1938 for violation of the Marijuana Act. Such a conviction is a deportable offense under the new Immigration and Nationality Act.

The action follows lengthy investigations by both the Federal Bureau of Investigation and the Immigration and Naturalization Service. His conviction under the Marijuana Act was one of only two in his checkered career. The other case in which he was convicted was under Louisiana State law, the conviction being for assault and robbery, and on May 13, 1930, he was sentenced to serve a term of 9 to 14 years in the Louisiana State Penitentiary. The Governor of Louisiana gave him a full pardon for this crime July 16, 1935.

Marcello served a year and a day after his conviction under the Marijuana Act.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 145

CARLOS MARCELLO,

Petitioner,

vs.

JOHN M. BONDS, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

1. *Trial by newspapers.* Respondent contends that the Attorney General's press release was merely "a statement of what was evident from the statute itself, that the 1952 Act made" petitioner's conviction a ground for deportation (Brief, p. 12).

This contention overlooks the full text of the press release and more important, its effect in foreclosing a fair hearing. The press release did more than announce that Marcello was deportable under the 1952 Act—a public statement

guage some of the fundamental principles of due process which shall be granted to aliens in deportation proceedings. It provides that an immigration officer shall not act as the special inquiry officer under this section in any case in which he has engaged in investigative or prosecuting functions. The language of this subsection puts into the positive law some of the provisions as to the conduct of the hearings which are contained in sections 5, 7 and 8 of the Administrative Procedure Act.

"As drafted, apparently in view of the liberal provisions of this section, *this subsection specifically provides that the Administrative Procedure Act shall not apply to deportation proceedings.* This provision carries forward the provisions of Chapter III of the Act of September 27, 1950 (P. L. 843, 81st Congress), excepting deportation provisions from the application of sections 5, 7, and 8 of the Administrative Procedure Act." (Italics supplied)

As finally drafted section 242(b) [Main Brief, p. 59] sets forth what immigration regulation "shall include." Obviously Congress did not attempt to spell out an all inclusive set of regulations, but merely minimum requirements. These provisions, therefore, cannot be utilized to say that the Administrative Procedure Act was thereby repealed.

As originally proposed by the Immigration Service and by Congress in section 242(b) of S. 3455, S. 716 and H. R. 2379, the Administrative Procedure Act was specifically repealed (Main Brief, pp. 17-18). Thereafter the specific repeal was removed. In view of section 12 of the Administrative Procedure Act and Congressional awareness of the necessity of an express repeal (Main Brief, p. 15), Con-

gress can hardly have removed the specific repeal because it was superfluous. The removal of the specific repeal was obviously intended, as Congressman Walter noted, to "reinstate" the Administrative Procedure Act; as Senator McCarran insisted to make the Administrative Procedure Act "prevail," (Main Brief, pp. 19, 20) and as the Conference Report (H. R. 2096, 82nd Congress) acknowledged to bring the bill "within the framework and the pattern of the Administrative Procedure Act" (Gov't Brief, p. 30).

(b) *Section 101(b)(4).* Respondent contends that section 101(b)(4) expressly repeals the Administrative Procedure Act (Brief, p. 25, footnote 3). Section 101(b)(4) merely authorizes the Attorney General to specify the supervision and duties of a special inquiry officer *not inconsistent with this Act.* Therefore, if the Act repealed the Supplemental Appropriation Act granting exemption from the Administrative Procedure Act, as it did in section 403(a)(47), and if it reinstated the Administrative Procedure Act as we contend, then section 101(b)(4) is immaterial. It must be consistent with the 1952 Immigration Act wherein the Administrative Procedure Act prevails.

(c) *Committee Reports.* As noted by respondent (Brief, p. 27, footnote 4), H. Rep. 1365, 82nd Congress, states that "the bill declares that the prescribed deportation proceedings shall be the sole and exclusive procedure for determining the deportability of any alien, *notwithstanding the provisions of any other law.* This was what the earlier bills, S. 3455, S. 716 and H. R. 2379 declared. It was not what the final draft of the Walter-McCarran Act provided in view of the removal of the phrase, "Notwithstanding any other laws, including the Act of June 11, 1946 (60 Stat. 237)." Moreover, it is difficult to explain away the comment of the Conference Report (H. R. 2096, 82nd Congress, 2nd Session, p. 127). This was the last report on the bill. It

emphasized that the deportation procedures "remain within the framework and the pattern of the Administrative Procedure Act." The pattern and framework of the Administrative Procedure Act require hearing officers who are not subject to superiors (other than the agency head) who investigate or prosecute. If the Conference Report is accurate, the Administrative Procedure Act prevails and is not repealed by section 242(b) or 101(b)(4).

(d) *The President's Commission on Immigration and Naturalization.* In its report *Whom We Shall Welcome* (1953, pp. 159-160) the President's Commission on Immigration and Naturalization comments that the apparent purpose of sections 242(b) and 101(b)(4) "was to establish an exemption from the procedural requirements of the Administrative Procedure Act without specifically mentioning that statute." It was in view of this "apparent purpose" that "responsible criticism" of the 1952 Act suggested that section 242(b) was contrary to the Administrative Procedure Act (Gov't Brief, pp. 32-33). However, this responsible criticism failed to analyze the effect of section 12 of the Administrative Procedure Act, the evolution of section 242(b) from an express repeal of the Administrative Procedure Act to an ambiguous implied repeal at best, and whether an "apparent purpose" of Congress was enough to effect such repeal.

(e) *Section 12 of the Administrative Procedure Act.*

Few cases have analyzed the effect of section 12 of the Administrative Procedure Act. None of the cases cited by respondent (Brief, p. 25) even mention this section.

In the Attorney General's comments on the Administrative Procedure Act (Senate Document 248, 79th Congress, 2d Session, p. 231), it is said:

> "* * * the act is intended to express general standards of wide applicability. It is believed that the courts should as a rule of construction interpret the act as applicable on a broad basis, unless some subsequent act clearly provides to the contrary."

We submit that neither section 242 (b) nor 101 (b) (4) of the Immigration Act clearly provides that special inquiry officers may be subject to the control of superiors who are investigators and prosecutors.

A helpful analysis of section 12 is set forth in *Nyon* v. *Dulles*, 122 F. Supp. 709 (Dist. of Col., 1954). In holding that the McCarran-Walter Act did not repeal the Declaratory Judgment statute, it was said:

> "The object and intent of Congress is enacting this beneficent and progressive legislation (the A.P.A.) is strongly emphasized by a unique and unusual expression found in the last section of the statute, 5 U.S.C.A., § 1011:
>
> "'No subsequent legislation shall be held to supersede or modify the provisions of this Chapter except to the extent that such legislation shall do so expressly.'
>
> "No intent on the part of Congress is discernible to repeal *pro tanto* the Declaratory Judgment Act of 1934, or to limit the Administrative Procedure Act. It is to be assumed that if Congress had intended to do so, it would not have accomplished this result in such an equivocal and indirect manner. Again, we must bear in mind the admonition contained in the Administrative Procedure Act that no subsequent legislation should be held to supersede or modify its